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Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

Section 2(3).....	2, 15
Section 7.....	2, 7, 8, 11, 18, 20
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DATE FILED
TO HOLD
In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-895

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL VAN LINES

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-31)¹ is reported at 448 F. 2d 905. The decision and order of the National Labor Relations Board (Pet. App. 34-83) are reported at 177 NLRB 353.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33) was entered on September 3, 1971, and the Board's timely petition for rehearing *en banc* was denied on October 12, 1971 (Pet. App. 33). The petition for

¹"Pet. App." refers to the appendix to the petition for certiorari. "A." refers to the separate appendix to the briefs.

a writ of certiorari was filed on January 10, 1972, and was granted on February 28, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether employees engaged in an economic strike who are discharged for that activity before they have been permanently replaced and then continue to strike have an unconditional right to be reinstated to their former jobs.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

SECTION 2. When used in this Act—

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

SECTION 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual

aid or protection, and shall also have the right to refrain from any or all of such activities
* * *

SECTION 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

SECTION 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In August 1967, Teamsters and Warehousemen, Local 381 (the "Union"), began an organizing drive among the employees of the approximately ten moving van and storage companies located in the Santa Maria, California area, including International Van Lines (the "Company") (Pet. App. 36, 54). On September 21, the Union, having obtained authorization cards from five of the Company's six full-time employees,¹ filed a representation petition with the Board's

¹ The Company hires additional employees on a casual or part-time basis as its needs warrant (A. 13-15).

Regional Office. A copy of the petition was sent to the Company and was received on September 25 (Pet. App. 36, 55, 56).

On October 2 and 3, the Union held meetings of the employees of the various moving van and storage companies in the area. At the meeting on October 2, Union Representative Ben Sanders stated that he had heard that some van lines, including the Company, had withdrawn their consent to an election, but he wanted to check the story out (Pet. App. 21, 57; A. 7-8). At another meeting, the next day, Sanders announced that he had "checked with our legal counsel and found that International Van Lines and other van lines * * * had withdrawn their consent for an election" (A. 8). On the basis of Sander's announcement, the employees decided to strike (Pet. App. 39, n. 7; A. 9, 27). The strike began at the Company on October 4, with pickets carrying signs bearing the legends "Unfair to Teamsters Local 381," "No Elections. Why," and "No Contract" (Pet. App. 36, 59-60; A. 31).

That morning, when the president of the Company, Robert McEwan, arrived at the Company's warehouse and saw the pickets, he attempted to persuade his employees to come to work.* The employees who were present—including Richard Dicus, Manuel Vasquez, and Salvador Casillas—refused, stating: "* * * we don't have a contract. We cannot cross the picket line." (Pet. App. 58-60; A. 38.) Robert Vasquez also

* Although the pickets at the warehouse were not employees of the Company, some of its employees were grouped in front of the warehouse (Pet. App. 59; A. 38).

did not report to work that day because of the picketing (Pet. App. 61). Unable to obtain replacements for his employees locally, McEwan postponed a job scheduled for that day and arranged with his brother, who operated another moving company—Mercury Van & Storage—at Oxnard, California, to obtain several employees whom his brother was in the process of laying off (Pet. App. 60-61; A. 40).

On October 5, three employees who had been laid off by Mercury (Mitchell, Hoffman and Burlington) and two others who had been obtained by McEwan's brother (including Contreras) worked for the Company (Pet. App. 61; A. 40, 46-48). These persons were carried on Mercury's payroll for their work that day (A. 40-41) and did not appear on the Company's payroll for the remainder of that pay period, which ended on October 11 (Pet. App. 37, n. 4; A. 65-67).^{*} Also on October 5, the Company notified employees Manuel and Robert Vasquez and Richard Dieus by telegram: "For failure to report to work as directed at 7 a.m. on Wednesday, October 4, 1967, you are being permanently replaced" (Pet. App. 36-37; A. 57-59).

^{*} Thereafter, Contreras appeared on the Company's payroll only for the periods ending October 18 and October 25, and Burlington appeared only for the period ending October 25. Hoffman did not appear on the payroll until the period ending October 25. There is no evidence that Mitchell performed any further work for the Company (Pet. App. 37, n. 4; A. 68-69). Robert McEwan continued to operate his business during the strike by hiring from time to time such other men as his needs required (Pet. App. 71).

Between October 8 and October 28, Dicus called on McEwan, who was in the hospital, and asked if he was going to have a job, but McEwan refused to commit himself (Pet. App. 69; A. 17, 42). Manuel Vasquez also visited McEwan in the hospital to inquire about going back to work, but he too received no commitment (Pet. App. 70; A. 30). Shortly after McEwan left the hospital on October 28, Dicus went to his office and again asked if he was going to have a job. McEwan replied that he did not know and that it was "the principle of the thing" (Pet. App. 69; A. 17-18). In the latter part of November, Salvador Casillas went to McEwan's office and told him that he could no longer stay out on strike since, unlike the other men, he did not have a wife who worked. He asked to be placed on an "availability list" (Pet. App. 37; A. 46). He was never called to work (A. 46).

About December 12, Richard Dicus, Manuel Vasquez, and Robert Vasquez went to President McEwan's office and asked to be reinstated to their former jobs. McEwan replied: "No, I cannot do it, I got men working for me that stuck by me through all this thing, and I just cannot go out there and fire them" (Pet. App. 37-38, 70; A. 18-19, 22-23, 29-30). He added: "How would you guys feel if I put you back to work, and two or three weeks from now do the same thing to you?" (A. 19).

B. THE BOARD'S DECISION AND ORDER

The Board found that the Company's employees had engaged in a strike to compel the Company to agree to a consent election, but that, even if the ob-

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ect of the strike was (as the trial examiner had found) to compel the Company to grant immediate recognition to the Union, it was nonetheless protected by Section 7 of the Act (Pet. App. 39-40); that the Company's telegrams of October 5 in effect discharged employees Manuel and Robert Vasquez and Richard Picus for engaging in the strike; and that, since these employees had not been permanently replaced at that time, the Company's action violated Section 8(a)(3) and (1) of the Act (Pet. App. 40-41). The Board also found that the unlawful discharges tended to prolong the strike, thereby converting "what had commenced as an economic walkout into an unfair labor practice strike"; accordingly it held that the Company further violated Section 8(a)(3) and (1) by refusing to reinstate, upon their unconditional applications, the three employees discharged by the telegrams, and Salvador Masillas (Pet. App. 41). The Board ordered the Company to reinstate the four employees and to make them whole, from the date of their unconditional applications for reinstatement, for any loss of pay resulting from the Company's unlawful action (Pet. App. 42).'

The Board also found that the Company violated Section 8(a)(1) of the Act by threatening its employees with loss of benefits if they chose union representation (Pet. App. 35-36). The court below held that substantial evidence did not support its finding (Pet. App. 16-21), and the Board does not contest that portion of the court's decision here.

Finally, the Board found that a majority of the employees had signed authorization cards and that the Company's unfair labor practices "could only have had the effect of destroying conditions needed for a fair election," and ordered the Com-